

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES INDUSTRIES,)	CV 06-5578 SVW (JCx)
INC., <i>et al.</i> ,)	
)	ORDER RE: PLAINTIFFS' MOTION
Plaintiffs,)	FOR PERMANENT INJUNCTION [395]
)	
v.)	
)	
GARY FUNG, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

As stated at the March 22, 2010 hearing, the Court's proposed deletions and additions are contained herein. The parties' responses

1 to the Court's alterations – and **only** the Court's alterations – shall
2 be filed according to the following schedule:

3 -Defendants' response of no more than eight pages: March 29, 2010;

4 -Plaintiffs' reply of no more than eight pages: April 5, 2010;

5 -Defendants' sur-reply of no more than five pages: April 12, 2010.

6 Upon receiving the parties' briefing, the Court will issue such further
7 orders as are necessary.

8 The Court's proposed additions are highlighted in **UNDERLINED BOLD**
9 and deletions in ~~strike-through text~~.

10 ///

11 ///

12 ///

13 On December 21, 2009, the Court granted Plaintiffs' Motion for
14 Summary Judgment on Liability, Docket # 391 (the "Order"), finding that
15 Defendants Gary Fung and Isohunt Web Technologies, Inc. (collectively,
16 "Defendants") induced infringement of Plaintiffs' copyrights in
17 violation of United States copyright law. See Metro-Goldwyn-Mayer
18 Studios, Inc. v. Grokster, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d
19 781 (2005). The Court found that "evidence of Defendants' intent to
20 induce infringement is overwhelming and beyond reasonable dispute,"
21 Order at 25, and therefore that "Defendants' inducement liability is
22 overwhelmingly clear," id. at 15. On the issue of a permanent
23 injunction, the Court has considered the briefs filed by the parties
24 and the argument presented at the hearing on this matter. Based on the
25 foregoing and all matters of record in this action, pursuant to Federal
26 Rule of Civil Procedure 65 and 17 U.S.C. § 502, the Court enters a

1 Permanent Injunction in favor of Plaintiffs and against Defendants in
2 accordance with the terms contained herein.

3 The Court concludes that a permanent injunction should issue to
4 restrain further infringement of Plaintiffs' copyrights. Plaintiffs
5 have satisfied their burden under eBay Inc. v. MercExchange, L.L.C.,
6 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006), "(1) that
7 [they have] suffered an irreparable injury; (2) that remedies available
8 at law, such as monetary damages, are inadequate to compensate for that
9 injury; (3) that, considering the balance of hardships between the
10 plaintiff[s] and defendant[s], a remedy in equity is warranted; and (4)
11 that the public interest would not be disserved by a permanent
12 injunction." Id. at 391.

13 Plaintiffs have demonstrated that they have suffered irreparable
14 harm, and would suffer further irreparable harm from Defendants'
15 continued infringement, in three independent ways. First, given the
16 staggering volume of infringement of Plaintiffs' copyrights, it is
17 extremely unlikely that Defendants will be able fully to compensate
18 Plaintiffs monetarily for the infringements Defendants have induced in
19 the past, or the infringements they could induce in the future. Metro-
20 Goldwyn-Mayer Studios, Inc. v. Grokster, 518 F. Supp. 2d 1197, 1217
21 (C.D. Cal. 2007) ("Grokster V"). Second, given the way in which
22 Defendants' system works, when Defendants' end-users download one of
23 Plaintiffs' works, the end-users automatically and simultaneously
24 further distribute the work to innumerable others as a required part of
25 the download process; additionally, at the conclusion of the download,
26 Defendants' end-users obtain an unprotected digital copy of Plaintiffs'

1 work that those end-users can further distribute indefinitely at will.¹
2 Thus, when Defendants induce infringement, "Plaintiffs' copyrighted
3 works can be unstoppably and near-instantaneously infringed throughout
4 the computer-literate world with the files obtained by [Defendants']
5 end-users. Plaintiffs' power to control their rights has been so
6 compromised by the means through which [Defendants] encouraged end-
7 users to infringe (digital files plus the internet) that the inducement
8 amounts to irreparable harm." *Id.* at 1218-19. Third, it is axiomatic
9 that the availability of free infringing copies of Plaintiffs' works
10 through Defendants' websites irreparably undermines the growing
11 legitimate market for consumers to purchase access to the same works.
12 *E.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913,
13 928-29, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005) ("digital
14 distribution of copyrighted material threatens copyright holders as
15 never before, because every copy is identical to the original, copying
16 is easy, and many people (especially the young) use file-sharing
17 software to download copyrighted works"); *A&M Records, Inc. v. Napster,*
18 *Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (citing "Napster's
19 deleterious effect on the present and future digital download market").
20

21 ¹The Court notes that Defendants argue that the Supreme Court's
22 holding in *Grokster* was limited solely to "devices" that induce
23 infringement. Defendants further argue that they are immune from an
24 injunction against their "activities." (Opp. at 6-7, 19.)
25 Defendants' argument lacks merit. Nothing in *Grokster* requires that
26 there be a "device"; the central inquiry is based on the defendants'
27 "purposeful, culpable expression and conduct." *Grokster*, 545 U.S. at
28 937. The Supreme Court's holding in *Grokster* was not limited solely
to "devices." The Supreme Court used terms such as "device,"
"product," and "tool" interchangeably. *Id.* at 940 n.13. In
addition, the clear import of the Supreme Court's opinion was that a
defendant may be secondarily liable for his conduct and activities
wholly separate and apart from any products, devices, or tools.

1 For many of the same reasons, Plaintiffs have demonstrated that
2 they do not have an adequate remedy at law for the harm that has been
3 or could be caused by Defendants' infringement. "'Damages are no
4 remedy at all if they cannot be collected.'" Grokster V, 518 F. Supp.
5 2d at 1219 (quoting Douglas Laycock, *The Death of the Irreparable*
6 *Injury Rule*, 103 Harv. L. Rev. 687, 716 (1990)). Likewise, "[a] legal
7 remedy is inadequate if it would require a multiplicity of suits." *Id.*
8 at 1220 (quoting Laycock, 103 Harv. L. Rev. at 714) (alteration in
9 original). Here, especially given the multiplicity of infringements of
10 Plaintiffs' works caused by a single user downloading a single dot-
11 torrent file from Defendants' sites, see Order at 6-7, it would be
12 untenable for Plaintiffs to track and proceed against each infringing
13 end-user. Additionally, Plaintiffs would not be able to recover
14 damages from Defendants for the inevitable derivative infringements
15 that would occur outside Defendants' websites when copyrighted content
16 acquired as a result of Defendants' inducement is further distributed
17 by Defendants' users. These further infringements are a continuing
18 threat, making remedies at law insufficient to compensate for
19 Plaintiffs' injuries. The only realistic method for remedying such
20 future harm from Defendants' inducement is by way of a permanent
21 injunction. Grokster V, 518 F. Supp. 2d at 1220.

22 The balance of hardships between Defendants and Plaintiffs also
23 warrants the issuance of a permanent injunction. As described, absent
24 an injunction, Plaintiffs would suffer a severe hardship as a result of
25 Defendants' inducement of infringement. The injunction being ordered
26 by the Court would not pose a corresponding hardship on Defendants.
27 The Court has already found that Defendants' websites are used
28

1 overwhelmingly for copyright infringement, with upwards of 95% of all
2 dot-torrent files downloaded from Defendants' websites corresponding to
3 works that are infringing or at least highly likely to be infringing.
4 Liability Order at 10-11. Obviously, the harm to Defendants from no
5 longer being able to exploit and profit from that infringement is not a
6 hardship the Court need consider. See Cadence Design Sys., Inc. v.
7 Avant! Corp., 125 F.3d 824, 829 (9th Cir. 1997) (defendant "cannot
8 complain of the harm that will befall it when properly forced to desist
9 from its infringing activities" (citation and internal quotation marks
10 omitted)). Beyond that, the Court's injunction is limited to
11 Plaintiffs' copyrights and will not substantially interfere with any
12 claimed non-infringing aspects of Defendants' system.

13 The Court is further persuaded that Defendants would likely
14 continue to induce infringement in the absence of a permanent
15 injunction. As this Court observed in Grokster:

16 [A] successful inducer will sometimes have no need to repeat the
17 infringing message ad infinitum. This is especially likely to be
18 the case where the product in question is overwhelmingly used for
19 infringing purposes, and requires little or no specialized
20 training to operate. At a certain point, the inducer can simply
21 continue to distribute the product without any additional active
22 encouragement, recognizing that the marketplace will respond in
23 turn. Thus, once the market has internalized the inducer's
24 promotion of infringement, the resulting infringements should be
25 attributable to that defendant even though he/she no longer
26 chooses to actively promote that message.

27 Grokster V, 518 F. Supp. 2d at 1233-34.
28

1 The Court finds those observations fully applicable to this case.
2 For years, Defendants operated their websites as popular destinations
3 for copyright infringement and etched their niche in the market for
4 infringement. Defendants were enormously successful in building a
5 user-base of infringers that, by Defendants' own account, number in the
6 millions. See Order at 42. As stated, the evidence of Defendants'
7 illegal objective was "overwhelming" and the resulting amount of
8 infringement of Plaintiffs' copyrights has been staggering.
9 Defendants' websites "remain[] inexorably linked to [Defendants']
10 historical efforts to promote infringement." Grokster V, 518 F. Supp.
11 2d at 1235. Absent an injunction directing Defendants to prevent
12 infringement of Plaintiffs' works, it is highly likely that Defendants'
13 existing users and new users would continue to use Defendants' system
14 to infringe Plaintiffs' copyrights.

15 Moreover, the Court's conclusion that Defendants are likely to
16 continue to induce copyright infringement is warranted by (1) the great
17 extent to which Defendants have actively encouraged copyright
18 infringement in the past; (2) the fact that Defendants' very business
19 model, at its core, depends upon copyright infringement, and Defendants
20 would financially benefit from further infringement; and (3) the fact
21 that, even since the Court's Order finding Defendants liable for
22 inducing copyright infringement, Defendants have not taken steps to
23 mitigate the infringement of Plaintiffs' works. Defendants' proposed
24 "primal" or "lite" website contains all of the same indexing and
25 searching functions as the original websites, only with a different
26 interface for the users to operate. (See Servodido Reply Decl., Ex. G,
27 at 15-21.) In fact, Defendants have not even ceased the actively
28

1 inducing conduct that the Court expressly indicated in its Order
2 plainly encourages and promotes copyright infringement. Defendant Fung
3 has affirmatively stated that he will not take steps to prevent
4 infringement on his websites unless he is ordered to do so by this
5 Court. (Fung interview, quoted in Defs. Opp. at 3.) In short,
6 Defendants' past and present statements and conduct establish that
7 Defendants "fully intend[] to continue [their] distribution of the"
8 tools that are central to their inducement of copyright infringement.
9 See Grokster V, 518 F. Supp. 2d at 1229-30.

10 Finally, the Court agrees that the public interest will be served
11 with a permanent injunction, since it will protect Plaintiffs'
12 copyrights against increased and unrestrained infringement. Id. at
13 1222. Although Defendants argue that the BitTorrent "ecosystem" would
14 be harmed by the present injunction (Opp. at 15-17), this injunction is
15 aimed solely at Defendants' unlawful use of BitTorrent and similar
16 technology, not at third parties' lawful use of BitTorrent and similar
17 technology.

18 The Court thus finds that the four part eBay test favors the
19 imposition of a permanent injunction to restrain Defendants'
20 infringement. In its discretion, the Court deems it appropriate for a
21 permanent injunction to issue.

22 [It will therefore be ordered, adjudged, and decreed that:]

23 1. For the purposes of this Permanent Injunction, the following
24 definitions shall apply:

25 (a) "Defendants" shall mean Gary Fung and Isohunt Web
26 Technologies, Inc., whether acting jointly or individually.

27 (b) "Isohunt System" shall mean the websites www.isohunt.com,
28

1 www.podtropolis.com, www.torrentbox.com, and www.ed2k-it.com, and
 2 shall further include any servers, trackers, software, and
 3 electronic data that make up or support such websites.

4 (c) "Comparable System" shall mean any website, system or
 5 software that provides users access to Plaintiffs' Copyrighted
 6 Works, using BitTorrent or any peer-to-peer or other file-sharing
 7 or content delivery technology.

8 (d) "Copyrighted Works" shall mean each of those works, or
 9 portions thereof, whether now in existence or later created, in
 10 which any Plaintiff (or parent, subsidiary or affiliate of any
 11 Plaintiff), at the time of Defendants' conduct in question, owns
 12 or controls a valid and subsisting exclusive right under the
 13 United States Copyright Act, 17 U.S.C. §§ 101 et seq., and which
 14 Plaintiffs have identified to Defendants by the title of the work.

15 (e) "Dot-torrent or similar files" shall mean dot-torrent files,
 16 magnet links, hash links, or other functionally similar files,
 17 links or identifiers.

18 (f) "Infringement-Related Terms" shall mean:

19 (i) terms that refer to the titles or commonly understood
 20 names of Plaintiffs' Copyrighted Works (for example, the
 21 title or common name of a television series);

22 ~~(ii) terms that signal the availability of Plaintiffs'~~
 23 ~~Copyrighted Works (for example, "Television," "Box Office~~
 24 ~~Movies," "DVD Rips," "Cam," "Telesync," "Telecine,"~~
 25 ~~"Screener" or "PPV"); or~~

26 (iii) terms that are widely associated with copyright
 27 infringement (for example "warez," "Axxo," or "Jaybob").
 28

1 2. Subject to the terms of Paragraph 5 below, Defendants shall be
2 permanently enjoined from knowingly engaging in any of the following
3 activities in connection with the Isohunt System or any Comparable
4 System:

5 (a) hosting, indexing, linking to, or otherwise providing access
6 to any Dot-torrent or similar files that correspond, point or lead
7 to any of the Copyrighted Works;

8 (b) assisting with end-user reproductions or transmissions of any
9 of the Copyrighted Works through a tracker server, or any other
10 server or software that assists users in locating, identifying or
11 obtaining files from other users offering any of the Copyrighted
12 Works for transmission; or

13 (c) hosting or providing access to any of the Copyrighted Works.

14 3. Defendants shall immediately and permanently be enjoined from
15 knowingly engaging in any activities having the object or effect of
16 fostering infringement of Plaintiffs' Copyrighted Works, including
17 without limitation, by engaging in any of the following activities:

18 (a) advertising or promoting access to or the availability of
19 Plaintiffs' Copyrighted Works;

20 (b) encouraging or soliciting users to reproduce or distribute
21 Plaintiffs' Copyrighted Works;

22 (c) encouraging or soliciting users to upload, post or index any
23 Dot-torrent or similar files that correspond, point or lead to any
24 of the Copyrighted Works;

25 (d) encouraging or soliciting users to link to copies of
26 Plaintiffs' Copyrighted Works;

27 (e) providing technical assistance or support services to users
28

engaged in infringement of, or seeking to infringe, Plaintiffs' Copyrighted Works;

(f) creating, maintaining, highlighting or otherwise providing access to lists of "top" downloads of, or search terms for, Dot-torrent or similar files that include, refer to or signal the availability of Plaintiffs' Copyrighted Works;

(g) including Infringement-Related Terms in metadata for any webpages;

(h) creating, maintaining or providing access to browsable website categories of Dot-torrent or similar files using or based on Infringement-Related Terms;

(i) organizing, harvesting or categorizing Dot-torrent or similar files using or based on Infringement-Related Terms;

(j) soliciting or targeting a user base generally understood, in substantial part, to be engaging in infringement of, or seeking to infringe, Plaintiffs' Copyrighted Works;

(k) transferring or redirecting users of the Isohunt System to any other service that, directly or indirectly, provides access to unauthorized copies of Plaintiffs' Copyrighted Works;

(l) indexing or providing access to Dot-torrent or similar files harvested or collected from well-known infringing source sites, such as "The Pirate Bay";

(m) soliciting revenue from third party advertisers or advertising brokers based on (or by referring to or highlighting) the availability of Plaintiff's Copyrighted Works.

4. The terms of Paragraphs 2 and 3 of this Permanent Injunction shall not apply to any Copyrighted Work for which Defendants have obtained

1 express written authorization or license for the use being made of such
2 Copyrighted Work from each Plaintiff that owns or controls the rights
3 to such Copyrighted Work, provided such authorization or license is in
4 force and valid at the time of Defendants' use of the Copyrighted Work.

5 5. Defendants shall not be in violation of this Permanent Injunction
6 as to Copyrighted Works that Plaintiffs, or representatives of
7 Plaintiffs, have not (a) identified to Defendants by title of the work,
8 and (b) represented to Defendants that, based on a reasonable review
9 and good faith belief, a Plaintiff (or a parent, subsidiary or
10 affiliate of a Plaintiff) owns or controls a valid and subsisting
11 exclusive right under the United States Copyright Act, 17 U.S.C. §§ 101
12 et seq. in the work (a "list of titles").

13 (a) Plaintiffs shall be permitted to supplement and update their
14 list of titles without restriction, including without limitation
15 with works soon-to-be but not yet released to the public.

16 (b) Plaintiffs shall provide Defendants with the list of titles
17 in electronic form.

18 (c) Defendants shall promptly provide Plaintiffs with a valid
19 email address to use for the lists of titles, and Defendants shall
20 immediately notify Plaintiffs in writing of any change in such
21 email address. A list of titles shall be deemed delivered when
22 sent to the most current email provided by Defendants.

23 (d) With regard to the initial list of titles provided by
24 Plaintiffs pursuant to this Permanent Injunction, Defendants shall
25 be required to comply with the terms of Paragraph 2 above no later
26 than 14 calendar days from the date Plaintiffs deliver the initial
27 list of titles.
28

1 (e) For all subsequent lists of titles, Defendants shall be
2 required to comply with the terms of Paragraph 2 above no later
3 than 24 hours from the time Plaintiffs deliver the list of titles.

4 (f) In the event a commercial vendor or other third party becomes
5 able to provide Defendants with a reliable list of Plaintiffs'
6 Copyrighted Works, Plaintiffs may apply to the Court for an order
7 modifying this Permanent Injunction to relieve them of the
8 obligation of providing Defendants with lists of titles, even if
9 there is a cost to Defendants of securing the lists of titles from
10 the commercial vendor or third party.

11 6. Prior to Defendants entering into any agreement or transaction
12 whatsoever to sell, lease, license, assign, convey, give away,
13 distribute, loan, barter, hypothecate, encumber, pledge or otherwise
14 transfer, whether or not for consideration or compensation, any part of
15 the software, source code, data files, other technology, domain names,
16 trademarks, brands, or Dot-torrent or similar files used in connection
17 with the Isohunt System or any Comparable System (a "Transfer of
18 Isohunt-Related Assets"), Defendants shall require, as a condition of
19 any such transaction, that the transferee:

20 (a) submit to the Court's jurisdiction and venue;

21 (b) agree to be bound by the terms herein; and

22 (c) apply to the Court for an order adding it as a party to this
23 Permanent Injunction.

24 Defendants shall not permit any Transfer of Isohunt-Related Assets to
25 close until the Court has entered such an order. Defendants further
26 shall not engage in a Transfer of Isohunt-Related Assets with or to any
27 person whom Defendants know to be engaged in, or intending to be
28

1 engaged in, conduct that would violate the terms of Paragraphs 2 or 3
2 above.

3 7. This Permanent Injunction shall bind Gary Fung, individually, and
4 Isohunt Web Technologies, Inc., and their officers, agents, servants,
5 employees, attorneys, successors, and assigns, and all those in active
6 concert or participation with any of them, who receive actual notice of
7 this Permanent Injunction by personal service or otherwise. Defendants
8 shall provide a copy of this Permanent Injunction to each of their
9 respective officers, agents, servants, employees, attorneys,
10 principals, shareholders, current and future administrators or
11 moderators for the Isohunt System (or Comparable System) or any online
12 forums associated with the Isohunt System (or Comparable System), and
13 any domain name registries or registrars responsible for any domain
14 names used in connection with the Isohunt System (or Comparable
15 System).

16 8. Nothing in this Permanent Injunction shall limit the right of
17 Plaintiffs to seek to recover damages under 17 U.S.C. § 504, or costs,
18 including attorneys' fees, under 17 U.S.C. § 505.

19 9. For purposes of clarity, as the Court has personal jurisdiction
20 over Defendants and has concluded that the conduct of Defendants
21 induces infringement of Plaintiffs' Copyrighted Works in the United
22 States under the copyright laws of the United States, this Permanent
23 Injunction enjoins the conduct of Defendants wherever they may be
24 found, including without limitation in Canada.

25 **10. The Court further clarifies that this injunction only covers acts**
26 **of infringement, as defined in 17 U.S.C. § 106, that take place in the**
27 **United States. To the extent that an act of reproducing, copying,**
28

1 distributing, performing, or displaying takes place in the United
2 States, it may violate 17 U.S.C. § 106, subject to the generally
3 applicable requirements and defenses of the Copyright Act. Further, as
4 explained in the Court's December 23, 2009 Order, "United States
5 copyright law does not require that both parties be located in the
6 United States. Rather, the acts of uploading and downloading are each
7 independent grounds of copyright infringement liability." Summary
8 Judgment Order at 19.

9 11. Violation of this Permanent Injunction shall expose the
10 Defendants, and all others properly bound by it, to all applicable
11 penalties, including for contempt of Court.

12 12. The Court shall maintain jurisdiction over this action for the
13 purposes of enforcing this Permanent Injunction.

14
15
16 IT IS SO ORDERED.

17
18 DATED: March 23, 2010



STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE